BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

IRENE RUIZ	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,017,707
HALLMARK CARDS, INC.	)	
Respondent	)	
Self-Insured	)	

ORDER

Respondent appeals the September 26, 2006 Award of Administrative Law Judge Brad E. Avery. Claimant was awarded a 6.33 percent functional impairment followed by a 33.5 percent permanent partial disability until December 8, 2005, and a 37 percent permanent partial disability thereafter. The Appeals Board (Board) heard oral argument on December 20, 2006.

APPEARANCES

Claimant appeared by her attorney, Roger D. Fincher of Topeka, Kansas. Respondent appeared by its attorney, John David Jurcyk of Roeland Park, Kansas.

RECORD AND STIPULATIONS

The Board has considered the record and adopts the stipulations contained in the Award of the Administrative Law Judge (ALJ). At oral argument to the Board, claimant stipulated that no work disability (permanent partial disability greater than a functional impairment) was being claimed until December 9, 2005, the date when claimant was no longer being paid her wages by respondent. Therefore, any entitlement by claimant to a permanent partial general work disability will be effective on that date.

ISSUES

1. Did claimant suffer accidental injury arising out of and in the course of her employment with respondent? More particularly, respondent denies that claimant suffered any injury to her cervical spine while in respondent's employment.

2. Did claimant provide timely notice of her injuries alleged to have occurred while working for respondent?

3. Is the deposition of Joseph Sankoorikal, M.D., taken by respondent on March 21, 2006, a part of this record? The deposition was properly noticed and taken by respondent, but the transcript was never filed with the Division of Workers Compensation by the respondent.

4. What is the nature and extent of claimant's injuries and disability?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of the ALJ should be modified to award claimant a functional impairment of 6.33 percent through December 8, 2005, followed by a permanent partial general disability of 31.5 percent effective December 9, 2005.

The Board will first clarify the record being considered for the purpose of this litigation. The evidentiary deposition of Joseph Sankoorikal, M.D., was taken by respondent on March 21, 2006. The deposition was completed, and the doctor waived his signature. No objection to the deposition was made at that time, and no motion to quash was filed with the Division of Workers Compensation. Claimant's Submission Brief, filed with the Division on April 10, 2006, listed Dr. Sankoorikal's deposition and discussed the deposition in that submission brief. Respondent's submission letter was filed with the Division on April 21, 2006. At that time, in the brief, respondent noted for the first time that the deposition of Dr. Sankoorikal was not being offered into evidence. No further explanation was given. At oral argument to the Board respondent objected to the deposition of Dr. Sankoorikal being included in the record. It was apparent that claimant's attorney was unaware that the deposition had not been provided to the ALJ.

Kansas Administrative Regulation 51-3-5 requires that the submission letter of a party contain a list of the witnesses deposed in the matter. Here, claimant listed the deposition of Dr. Sankoorikal and discussed the evidence contained therein. With the exception of a single line inserted in a 17-page submission letter, respondent filed no objection to the use of the deposition. The Board finds the deposition of Dr. Sankoorikal, taken March 21, 2006, is a part of the record for the purposes of this litigation.

Claimant alleges accidental injury during the first week of January of 2004, when she hurt her left shoulder and left hand while tightening some bolts on her press machine.

Claimant acknowledges that she did not tell respondent of this accident until February 25, 2004.

Claimant alleges a second accident just before February 25, 2004, while lifting heavy card stock. This second accident was not a single traumatic incident, but rather a series of accidents occurring while claimant loaded the card stock into a machine. Claimant reported these problems to respondent's company nurse, Connie Drake, on or about February 24, 2004. The respondent's nurse's notes of February 24, 2004, memorialize claimant's allegations of symptoms from her work, with the pain in her left shoulder, arm and wrist. Claimant advised nurse Drake that the pain had existed for about two months.

Claimant was referred to the emergency room at St. Francis Hospital and Medical Center on February 25, 2004, at which time she came under the care of Laurel Vogt, M.D. Dr. Vogt was provided a history of left wrist and shoulder pain, with a duration of about 6 months, and a worsening within the last week due to work activities. Claimant was examined and provided a splint for her left wrist. She was returned to light-duty work with minimal use of her left arm.

On March 4, 2004, claimant's restrictions were modified to limit her lifting, pushing and pulling to 10 pounds. Claimant was also referred to physical therapy for her neck and both shoulders, as well as occupational therapy for her left forearm and wrist. On April 6, 2004, claimant provided respondent with a doctor's slip, releasing claimant to full duty effective April 13, 2004. However, claimant's return to regular duty was gradual. As of April 13, 2004, claimant was scheduled to gradually increase her work duties, working 2 hours regular duty and 6 hours of light duty per day. Then claimant was to expand to 4 hours regular duty and 4 hours of light duty per day and then 6 hours regular duty and 2 hours of light duty per day, with a final release for full-time work at regular duty anticipated. However, when claimant reached the 6-hour regular-duty work schedule, she noted her wrist began to hurt, with added pain into the shoulder and across her back. After complaining to respondent's nurse, claimant was returned to St. Francis Hospital for ongoing conservative care. At St. Francis Hospital, claimant was seen by Donald T. Mead, M.D. Dr. Mead continued claimant on physical therapy and returned claimant to work with a 15-pound restriction.

Claimant's last day worked with respondent was August 18, 2004, as she had exceeded the time allowed by respondent on light duty. However, claimant continued to be paid her regular wages through December 8, 2005. The reason for this continued payment is not discussed in this record. But claimant has stipulated that she would not qualify for permanent partial disability beyond her functional impairment until December 9, 2005.

Claimant was referred by her attorney to internal medicine specialist Daniel D. Zimmerman, M.D., with the first examination occurring on August 11, 2004. Dr. Zimmerman diagnosed claimant with a permanent aggravation of cervical degenerative disc disease and osteoarthritis. He next examined claimant on September 9, 2005. At that time, he determined claimant was at maximum medical improvement (MMI). Dr. Zimmerman rated claimant at a 6 percent permanent partial impairment for her anatomic pathology at the cervical level and a 4 percent permanent partial impairment for her range of motion limitations at the cervical level. Using the combined values chart, he rated claimant at 10 percent to the body as a whole for her work-related problems. These ratings were pursuant to the fourth edition of the AMA *Guides*.[1]

Dr. Zimmerman determined that claimant's left upper extremity, cervical paraspinous musculature and trapezial musculature problems were the result of her work with respondent. He restricted claimant from lifting over 20 pounds on an occasional basis and 10 pounds frequently. Claimant was to avoid hyperflexion and hyperextension of the cervical spine. Dr. Zimmerman determined that claimant could perform light-duty work and gave almost identical weight and range of motion restrictions as Dr. Sankoorikal. In reviewing the task list prepared by vocational expert Dick Santner, Dr. Zimmerman determined claimant had lost the ability to perform 3 of 12 job tasks for a 25 percent task loss.

Claimant was examined at respondent's request by board certified occupational medicine specialist Chris D. Fevurly, M.D., on February 14, 2006. Dr. Fevurly diagnosed claimant with chronic neck pain, with MRI evidence of degenerative changes in the cervical spine. He testified that it was reasonable to credit some of claimant's neck and upper back pain to the repetitious tasks claimant performed while working for respondent. Dr. Fevurly limited claimant to medium to heavy work, with occasional lifting to 50 pounds from the floor to the waist, frequent lifting to 30 pounds, and repetitious lifting to 15 pounds. He restricted claimant from prolonged overhead-looking work. Dr. Fevurly noted the FCE, performed at St. Francis Hospital on March 23, 2005, limited claimant to 22 pounds occasional lifting and 12 pounds frequent lifting and 5 pounds continuous lifting, but did not believe these restrictions were supported by her underlying pathology. Dr. Fevurly did agree that claimant had suffered a 5 percent whole person impairment attributable to her work duties with respondent. In considering the task list prepared by vocational expert Michelle Sprecker, Dr. Fevurly determined claimant had the ability to perform all the tasks on the list, for a zero percent task loss.

Claimant was referred to Dr. Sankoorikal for an examination and treatment on May 18, 2004. At that time, claimant was diagnosed with neck and shoulder pain, with Dr. Sankoorikal finding trigger points in her left shoulder musculature. He diagnosed

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[1] American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.).

muscular ligamentous type pain. Dr. Sankoorikal limited claimant to light to medium work on January 4, 2005, and last examined her on April 29, 2005. He adopted the FCE restrictions and assessed claimant a 4 percent permanent partial whole body impairment for the bilateral shoulder and cervical pain, which he determined was probably caused by claimant's work. In reviewing the task list of Dick Santner, Dr. Sankoorikal determined claimant had lost the ability to perform 2 of 12 tasks for a 17 percent task loss.

Between August of 2004 and February of 2006, claimant sought alternative employment with fourteen different employers, less than one attempt per month.

In workers compensation litigation, it is the claimant's burden to prove his/her entitlement to benefits by a preponderance of the credible evidence.[2]

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.[3]

> If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.[4]

The two phrases "arising out of" and "in the course of," as used in K.S.A. 44-501, et seq.,

> . . . have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable. The phrase "in the course of" employment relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the workman was at work in his employer's service. The phrase "out of" the employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidents of the employment."[5]

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[2] K.S.A. 44-501 and K.S.A. 2004 Supp. 44-508(g).

[3] *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

[4] K.S.A. 44-501(a).

[5] *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 689 P.2d 837 (1984); *citing Newman v. Bennett*, 212 Kan. 562, Syl. ¶ 1, 512 P.2d 497 (1973).

As noted by the ALJ, Drs. Zimmerman, Sankoorikal and Fevurly all found that claimant's work activities for respondent caused or contributed to the injuries to claimant's back and cervical spine.

It is well established under the Workers Compensation Act in Kansas that when a worker's job duties aggravate or accelerate an existing condition or disease, or intensify a preexisting condition, the aggravation becomes compensable as a work-related accident.[6]

The Board finds that claimant has satisfied her burden that she suffered accidental injury of a permanent nature to her cervical spine and her back and temporary aggravations to her shoulders, left arm and wrist while performing work for respondent.

K.S.A. 44-520 requires notice be provided to the employer within 10 days of an accident.[7]

Claimant acknowledges that the injury suffered during the first week of January 2004 was not reported to respondent until February 25, 2004. The ALJ found this notice to be untimely, and the Board agrees. The denial of benefits for this accident is affirmed. Claimant also alleges a series of accidents through February 25, 2004, while she was handling card stock. Claimant reported these problems to respondent's nurse almost immediately. Additionally, claimant was referred for medical treatment for these injuries within a day of the report. The Board finds notice of these injuries was timely.

K.S.A. 44-510e defines functional impairment as,

> . . . the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein.[8]

The ALJ averaged the functional impairment opinions of the three testifying physicians in this matter. He found no justification for giving greater credence to any of the three, averaging the functional impairments to reach a 6.33 percent functional whole body impairment. The Board finds the functional award of the ALJ to be proper and affirms same.

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[6] *Demars v. Rickel Manufacturing Corporation*, 223 Kan. 374, 573 P.2d 1036 (1978).

[7] K.S.A. 44-520.

[8] K.S.A. 44-510e(a).

> The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury.[9]

In determining what, if any, wage loss claimant has suffered, the statute must be read in light of both *Foulk*[10] and *Copeland.*[11] In *Foulk*, the Kansas Court of Appeals held that a worker could not avoid the presumption against work disability as contained in K.S.A. 1988 Supp. 44-510e (the predecessor to the above quoted statute) by refusing an accommodated job that paid a comparable wage. In *Copeland*, the Kansas Court of Appeals held, for the purposes of the wage-loss prong of K.S.A. 44-510e (Furse 1993), that a worker's post-injury wage should be based upon the ability to earn wages, rather than the actual earnings, when the worker failed to make a good faith effort to find appropriate employment after recovering from the work-related accident.

> If a finding is made that a good faith effort has not been made, the factfinder *[sic]* will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages. . . .[12]

Claimant has expended little effort in a post-injury job search. Only fourteen job contacts between August of 2004 and February of 2006 does not constitute a good faith effort to find post-injury employment. The vocational experts who testified in this matter found claimant's post-injury wage earning ability to range from $280 to $452.20 per week. The Board determines that claimant's ability to earn wages falls between the high and low of the expert opinions. An average of the wage earning opinions results in a post-injury wage of $366.10. As noted above, claimant's entitlement to a permanent partial disability begins on December 9, 2005, at which time, it is stipulated, claimant's average weekly wage was $718.06. This wage, when compared to claimant's post-injury wage earning ability of $366.10, results in a wage loss of 49 percent.

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[9] K.S.A. 44-510e.

[10] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

[11] *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

[12] *Id.* at 320.

Three task loss opinions were placed into this record. Dr. Sankoorikal found claimant to have suffered a task loss of 17 percent. Dr. Zimmerman found a 25 percent task loss. Dr. Fevurly found claimant had not suffered a loss of ability to perform previous tasks. In considering the opinions of the three physicians, the Board finds claimant suffered a task loss of 14 percent. When averaging the task loss with the wage loss, the Board finds claimant to have suffered a permanent partial disability of 31.5 percent.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Brad E. Avery dated September 26, 2006, should be, and is hereby, modified to award claimant a 6.33 percent permanent partial whole body disability through December 8, 2005, followed by a 31.5 percent permanent partial disability effective December 9, 2005.

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, and against the respondent, Hallmark Cards, Inc., a self-insured, for an accidental injury which occurred through a series of accidents culminating on February 25, 2004, and based upon an average weekly wage of $633.60 through December 8, 2005, and an average weekly wage of $718.06 effective December 9, 2005, for 23.43 weeks of temporary total disability compensation at the rate of $422.42 per week or $9,897.30, followed by 25.74 weeks at the rate of $422.42 per week or $10,873.09 for a 6.33 percent permanent partial whole body functional disability, followed by 102.33 weeks at $440 per week totaling $45,025.20 for a 31.5 percent permanent partial whole body disability, making a total award of $65,795.59.

As of January 3, 2007, there is due and owing claimant 23.43 weeks of temporary total disability compensation at the rate of $422.42 per week or $9,897.30, followed by 25.74 weeks of permanent partial disability compensation at the rate of $422.42 per week in the sum of $10,873.09, followed by 55.71 weeks of permanent partial disability at the rate of $440 in the sum of $24,512.40, for a total of $45,282.79, which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of $20,512.80 is to be paid for 46.62 weeks at the rate of $440 per week, until fully paid or further order of the Director.

In all other regards, the Award of the ALJ is affirmed insofar as it does not contradict the findings and conclusions contained herein.

IT IS SO ORDERED.

Dated this ____ day of January, 2007.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Roger D. Fincher, Attorney for Claimant
John David Jurcyk, Attorney for Respondent
Brad E. Avery, Administrative Law Judge